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Supreme Court, U.S.
FILED

No. 02-1811 JUN 6 - 2003

In The

Supreme Court of the United States

ALVIN C. GREEN, a/k/a Bones, a/k/a Shaka,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. The trial court abused its discretion by overruling Petitioner's request for sequestration of agents/witnesses at the trial of this matter.

2. The trial court abused its discretion in admitting wire tap conversations into evidence at trial, deeming the same to have been authenticated.

LIST OF PARTIES

The parties to this proceeding are petitioner, Alvin C. Green, and respondent, United States of America, through the office of the Attorney for the United States for the Middle District of Louisiana, through Robert Piedrahita, Assistant United States Attorney.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Alvin C. Green, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, filed on March 11, 2003.

OPINION BELOW

The Fifth Circuit Court of Appeals selected its opinion for publication in the Federal Reporter. Currently, the decision is reported at *U.S. v. Green*, number 01-31359 (March 11, 2003), 2003 WL 943627. The district court did not publish an opinion in this case. The decision of the Fifth Circuit Court of Appeals is reprinted in the Appendix at Appendix A.

STATEMENT OF JURISDICTION

The Fifth Circuit Court of Appeals filed its decision of March 11, 2003. This Court has jurisdiction under 28 U.S.C. §1254(1) and U.S. Sup. Ct. Rule 13.1 and 13.3.

Per U.S. Sup. Ct. Rule 10(a) and (c), this Court should grant *Certiorari* because the United States Court of Appeals for the Fifth Circuit has entered a decision in conflict with the decision of the United States Court of Appeals for the Fourth Circuit on the same important matter, and these decisions present an important federal question which has not been, but should be, settled by this Court, as lower federal courts appear to be in decisional conflict regarding the issues.

RELEVANT PROVISION INVOLVED

Federal Rule of Evidence Rule 615, 28 U.S.C.A., states:

> "At the request of a party the Court **shall** order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of . . . (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause . . ." (emphasis supplied)

STATEMENT OF THE CASE

From June to August, 1999, pursuant to court authorization, law enforcement agents intercepted telephone conversations occurring over two cellular telephones used by petitioner. On January 27, 2000, petitioner was arrested, and on April 5, 2000, he was indicted on the following charges: Count I, Conspiracy to Possession With Intent to Distribute and to Distribute Cocaine and 50 Grams or More of Cocaine Base in violation of 21 U.S.C. §846; Count II, Distribution of 50 Grams or More of Cocaine Base in violation of 21 U.S.C. §841(a)(1); Counts IV and V, Engaging in a Monetary Transaction Using Criminally Derived Property, in violation of 18 U.S.C. §1957; Counts VI through IX, Unlawful Use of Communications Facilities, in violation of 18 U.S.C. §843(b); and Count X, Possession of a Firearm by a Convicted Felon, in violation of 18 U.S.C. §922(g)(1). The respondent filed two (2) superceding indictments which amended Counts I, II and X to include,

among other things, petitioner's prior drug and felony convictions. [NOTE: Petitioner's motion to strike such convictions from the indictment was granted. (App. A at 2.)]

A number of pre-trial hearings were held, as both parties filed pre-trial motions. Relevant to this Petition, the district court granted the government's motion to authenticate the intercepted wire taps and to use the corresponding transcripts. The case proceeded to a jury trial, and during the trial, at the commencement thereof, the district court denied petitioner's request to sequester Special Agent Mark Lusco (Lusco) and Task Force Agent Rudy Babin (Babin), collectively with Lusco, "DEA Agents", from being present in the courtroom. (App. A at 2.)

On April 19, 2001, the trial jury found petitioner guilty on all counts. Petitioner was sentenced to life imprisonment on Counts I, II and X, ten (10) years on Counts IV and V, and eight (8) years on Counts VI through IX, with all terms to be served concurrently. (App. A at 3.) Respondent appealed the district court's procedural rulings by timely appeal to the United States Court of Appeals for the Fifth Circuit, under appeal number 01-31359, which after oral argument held on December 5, 2002, handed down its decision on March 11, 2003. (App. A. at 3.) The Fifth Circuit Court affirmed in part and reversed in part. (App. A. at 1, 14.) Specifically, that court reversed the denial of petitioner's suppression motion, pertaining to a warrantless search of a vehicle and the seizure of a gun from that episode. (App. A at 3-7.) Thus, the Fifth Circuit Court, in reversing the vehicle search, vacated the conviction as to Count X, remanded that

matter to the district court for further proceedings consistent therewith, and affirmed the remaining convictions. (App. A. at 1, 14.) It is from the affirmations of the Fifth Circuit Court, as such pertain to two (2) issues presented to that court on appeal, namely issue number two (2), whether the trial court abused its discretion in finding the respondent met its burden of authentication of telephone intercept recordings and, thus, permitting their use in evidence at the trial of the case (App. A at 7-8.), and issue number five (5), concerning the trial court's denial of petitioner's request to invoke the rule sequestration under Rule 615 of the Federal Rules of Evidence, in that two (2) DEA agents were permitted to remain at respondent's counsel table throughout the trial, both of whom were called to testify as to facts. (App. A at 8-9.) Their testimony also involved the second issue of this Petition, regarding authentication of the wire tap tapes. From the Fifth Circuit's affirming the trial court's decisions regarding those two issues, this Petition for Writ of Certiorari follows.

REASONS FOR GRANTING THE WRIT

This Court should resolve the split between the Fifth Circuit Court of Appeals and the Fourth Circuit Court of Appeals, as to whether Federal Rules of Evidence Rule 615 is a mandatory provision, not susceptible to trial court discretion, and whether strict prejudice is a requirement which must be proven by a petitioner/defendant in finding the rule of sequestration was violated to be afforded relief. The Fifth Circuit, in this matter, and in *U.S. v. Hickman,* 151 F.3d 446, 453, re-hrg. granted, vacated 165 F.3d 1020, cert. dismissed 119 S.Ct. 923, 525 U.S. 113 (5th Cir. 1998),

determined though Rule 615 of the Federal Rules of Evidence had been violated, and that the trial court abused its discretion overruling an objection to the presence of two (2) agents during the trial of the case, the defendants did not show how such were prejudiced by the error. The Fifth Circuit in *Hickman*, specifically discusses *U.S. v. Farnham,* 791 F.2d 331 (4th Cir. 1986), in which that circuit reversed decisions because two (2) case agents were excused from the sequestration rule, reasoning the dictate of Rule 615 is mandatory, and not susceptible to trial court discretion, or to a strict prejudice requirement (see id. at 335). The Fifth Circuit, however, found *Farnham* was not controlling or persuasive in light of its approach to Rule 615. *Farnham* held the mandatory "shall" language of the rule and the singular phrasing of the exception embodied in 615(2), ignored by the Fifth Circuit, controlled. Also, *Farnham* held, contrary to the Fifth Circuit holding(s), a technical violation of Rule 615 does not lack consequence because a defendant cannot prove prejudice. Rather, the Fourth Circuit determined it would almost be impossible to sustain the burden of proving the negative inference that the second agent's testimony would have been different had he been sequestered. *Farnham,* 719 F.2d at 335. Further, that a strict prejudice requirement of this sort would be not only unduly harsh, but also self-defeating, in that it would swallow a rule carefully designed to aide the truth-seeking process and preserve the durability and acceptability of verdicts. *Farnharm,* 791 F.2d at 335. The primary distinction between the Fifth Circuit and the Fourth Circuit rulings, is the Fourth Circuit holds Rule 615 should be construed narrowly in favor of the party requesting sequestration, in opposition to the holdings of the Fifth

Circuit, and that no showing of prejudice is required from Rule violation.

As this question involves a serious and important issue pertaining to the reliability of a fair and impartial trial, the split between the Fourth and Fifth Circuits should be put to rest by this High Court. Also, the additional issue forwarded in this application is intertwined with the foregoing, concerning the requirements of Rule 615, in reference to wire tap authentication. The Fifth Circuit found the interceptions had been authenticated. However, the findings in the trial court, and the Fifth Circuit, are a departure from the accepted and usual course of a fair and impartial judicial proceeding to the extent such call for an exercise of this Court's supervisory power. Especially, in light of the fact respondent was unable to meet its burden of moving forward with establishing authenticity by the principles laid down in *U.S. v. Biggins,* 551 F.2d 64, 66 (5th Cir. 1977). Simply stated, the district court could not have properly found the telephone intercepts accurately, or reliability, reproduced the auditory experience from the government's presentation, in light of the factors addressed in *Biggins*. Thus, the district court erred in its declaration the intercept of wire communications had been authenticated and in denying petitioner's sequestration request, and the Fifth Circuit should have reversed such findings and vacated the same.

LEGAL DISCUSSION

I. The district court and the U.S. Court of Appeals for the Fifth Circuit have incorrectly construed Rule 615 of the Federal Rules of Evidence, by disregarding the mandatory language of the same and requiring a respondent/defendant to meet a strict prejudice requirement in the event of a violation of such rule.

The district court denied petitioner's request to invoke the Rule of Sequestration, pursuant to Rule 615 of the Federal Rules of Evidence, requesting the Court to disallow two (2) DEA agents to remain in the courtroom throughout the trial. (App. A at 8-9.) Respondent argued Rule 615 did not set forth a limit to the number of case agents which may sit at its table during the trial, even though both are scheduled to testify and do so. (App. A at 8-9.) The Fifth Circuit set forth in its holding in App. A at 8-9, it had never decided whether the government could designate more than one individual as its case agent, but it had permitted such exemption of more than one case agent from sequestration if their presence was essential to the presentation of the case, and it cited *U.S. v. Hickman,* 151 F.3d 446 (5th Cir. 1998) as the basis for its holding. (App. A at 8.)

However, the Fifth Circuit found, upon a review of the record, that it was not persuaded a division of responsibility of the agents was necessary to render their presence in the courtroom throughout the trial, nor essential to the government's presentation of its case. (App. A at 9.) Likewise, it found the district court did not offer any compelling rationale for why both DEA agents' presence was essential to the case, in denying petitioner's request for

sequestration of one of them. (App. A at 9.) The Fifth Circuit then stated, further on, that while it deemed the presence of both DEA agents arguably unnecessary, nonetheless because petitioner had not identified any specific prejudice he suffered because of their presence, it declined to find the district court committed reversible error in exempting them from sequestration. (App. A at 9.)

Such ruling is directly in opposition to that of the Fourth Circuit under *U.S. v. Farnham,* 791 F.2d 331 at 334-335 (4th Cir. 1986). The *Farnham* case held Federal Rule of Evidence 615 requires the trial court, at the request of the party, to sequester witnesses, expressly providing an exception for an "officer or employee of a party which is not a natural person designated as its representative by its attorney under 615(2), as the government did in this matter with the two DEA agents it requested exempted from such rule. But in the case at hand, as in *Farnham*, the district court refused the timely request to permit only one of the two case agents to remain in the courtroom, thus allowing the second agent to hear the testimony of the first agent, with both agents testifying. Their testimony overlapped one another's and related to the same circumstances, events, and occurrences. Of importance in this case, both agents were slated to testify regarding the intercepted telephone conversations, a subject of the second issue in this Petition for Writ of Certiorari, and did so testify.

Further, the respondent made specific mention, in the trial record, on a least three (3) occasions, to the second agent to testify, reminding he had heard the testimony of the first agent in direct examination, concerning facts of

the case and wire taps. Such directly, or indirectly, focused the second agent's responses to the others earlier testimony. Additionally, neither agent contradicted the other as in *Hickman*. Thus, the matter is substantially different and distinguished from *Hickman*.

While the Fifth Circuit discusses *Farnham* in its *Hickman* decision, and specifically cites *Hickman* as the basis for its holding in petitioner's appeal before it, its ruling in this matter, and in *Hickman*, are directly in opposition to the *Farnham* holding. [NOTE: Farnham, in its holding, discusses the Fifth Circuit case of *U.S. v. Causey,* 609 F.2d 777 (5th Cir. 1980) regarding the prejudice issue.] The Fifth Circuit rules a position that even if the district court abuses its discretion in overruling an objection to the presence of more than one agent at the government's table during the trial, the defendant/petitioner must show prejudice for relief to be granted. *U.S. v. Hickman,* 151 F.3d at 453-454; *U.S. v. Causey,* 609 F.2d 777 (5th Cir. 1980). Both the Fourth Circuit and the Fifth Circuit agree the purpose of Rule 615 is to prevent witnesses from tailoring their testimony to match one another's, and to discourage fabrication, inaccuracy and collusion. *U.S. v. Hickman,* 151 F.3d at 454; *U.S. v. Farnham*, 791 F.2d at 335.

Therefore, as set forth in *Farnham*, when a technical violation of Rule 615 occurs, as in this matter, the suggestion such lacks consequences because the defendant cannot show prejudice, was rejected. *U.S. v. Farnham,* 791 F.2d at 335. *Farnham* sets forth such a position would make it impossible for a defendant to sustain the burden of proving the negative inference that the second agent's testimony would have been different had he been sequestered. *U.S. v. Farnham,* 791 F.2d at 335. *Farnham* further

states a strict prejudice requirement of this sort would be not only unduly harsh but also self-defeating, in that it would swallow a rule carefully designed to aid the truth-seeking process and preserve the durability and acceptability of verdicts. *U.S. v. Farnham,* 791 F.2d at 335. Also, Rule 615 reflects an *a priori* judgment in favor of sequestration, and the exceptions should be construed narrowly in favor of the party requesting sequestration. *U.S. v. Farnham,* 791 F.2d at 335.

In light of the Fifth Circuit's finding in its decision in this matter at App. A at 9, that even if it was not persuaded the DEA agents' presence in the courtroom was necessary or essential to the government's presentation of its case under Rule 615(3), the Petition should be granted. The Fifth Circuit's decision in this matter is clear it did not believe both agents were necessary to the government's case to justify presence in the courtroom throughout the trial and, in fact, stated at App. A at 9, it was arguably unnecessary. Thus, the only remaining issue in that regard concerns the Fifth Circuit's notion of "specific prejudice" (App. A at 9) in contrast to that of Fourth Circuit which holds Rule 615 does not require such a finding, and the sequestration rule is mandatory through the "shall" verbiage of the same. Federal Rules of Evidence Rule 615, 28 U.S.C.A. Thus, this Petition for Writ of Certiorari should be granted, allowing this High Court to settle the strict prejudice issue of Federal Rules of Evidence Rule 615, and the conflicting decisions between the Fifth and Fourth Circuits. [NOTE: Later in the trial the two (2) DEA agents were qualified as experts. (App. A at 10.) They were not so qualified prior to testimony and were not such as they sat at the Respondent's table prior to testifying.]

II. The district court abused its discretion and erred in finding the respondent had met its burden for authenticating the intercepted telephone communications.

On April 11, 2001, a motion to authenticate intercepted wire communications and for authority to use transcripts was heard in the district court. On that same day, the district court granted the government's motion to use the tapes and transcripts at trial, finding the recording process had been authenticated. (App. A at 7-8.) The defendant/petitioner objected and sought relief in its appeal to the United States Court of Appeals for the Fifth Circuit, on the basis the government did not meet its burden of demonstrating the telephone intercept recordings were reliable and trustworthy. (App. A at 7.) Specifically, the government could not support, and did not offer into consideration at the motion hearing before the district court, proof with respect to: (1.) competency of the operators; (2.) fidelity of the recording equipment; and, (3.) absence of material deletions as required under *U.S. v. Biggins,* 551 F.2d 64 (5th Cir. 1977). Such is also set forth in *U.S. v. Stone,* 960 F.2d 426 (5th Cir. 1992). The burden in such aspect falls directly on the government, because it has access to such information in a way a criminal defendant does not in a case such as the one at hand. *U.S. v. Biggins,* 551 F.2d at 66. Thus, the government, in a criminal case, must establish how the equipment was operated, the operator's competency, and the recording equipment's fidelity, along with other considerations, for the same to be properly authenticated and admitted for use at trial. *U.S. v. Thompson,* 130 F.3d 676 (5th Cir. 1997); *U.S. v. Buchanan,* 70 F.3d 818 (5th Cir. 1995). While it is understood by petitioner any formalistic standard for the admissibility

of tapes and transcripts into evidence in a criminal trial, is not specifically required, a substantiality of the rudimentary elements set forth in *Biggins* must be proven by the government. *U.S. v. Brown,* 692 F.2d 345 (5th Cir. 1982).

The Fifth Circuit, in upholding the district court's ruling on the authenticity issue, found the testimony of DEA Agent Lusco was sufficient to accurately reproduce the auditory experience. (App. A at 7-8.) The Fifth Circuit held the government met its burden, as DEA Agent Lusco was able to identify the voice of petitioner, although Lusco was unaware of the specific workings of the equipment and the operator's competency or the other issues set out in *Biggins*. (App. A at 7-8.) Such was also confirmed in the trial record at V. 8, pp. 2-36 and R.V. 8, pp. 17-18. The DEA agent also admitted at the trial there were times when, after reflection, the equipment did malfunction. (R.V. 8, p. 33.)

As to the government's other witness, Barry Stewart, a representative of a recording equipment company, admitted at trial he did not know who the monitors were operating the equipment in the case (App. A at 7; R.V. 8, p. 48), nor did he possess any independent knowledge the people who actually were the operators/monitors were in fact, trained on whatever equipment was used by the government. (App. A at 7; R.V. 8, p. 48.) Further, the system and equipment to which he was qualified to testify as an expert, he could not verify was the same used for the telephone intercepts in this case. (R.V. 8, p. 47.) And, lastly, he testified he did not know for sure, or of his own knowledge, where the equipment was, whatever equipment was used, when the recordings were made, or the state of the equipment at the time of the recordings. (R.V. 8, p. 49.) This witness admitted he had not inspected the

equipment, either prior to the telephone intercepts in this case, nor subsequent thereto, purportedly offered by the government as those used. (R.V. 8, p. 49.)

Thus, the only basis the Fifth Circuit found to uphold the district court's ruling, was that Agent Lusco was able to identify the voice of petitioner. (App. A at 8.) The Fifth Circuit cites, for its holding, principally, *U.S. v. Stone,* 960 F.2d 426, 436 (5th Cir. 1992). However, in that case, the person testifying as to the authenticity of the tapes was an individual whose voice was also on the recordings in conversation with the defendant. The instant case is very distinguishable from that setting, as there was no testimony in the district court as to the *Biggins* test requirements, nor did anyone whose voice was allegedly on the tape testify to the same.

Therefore, it is the argument of petitioner the district court and the Fifth Circuit have departed from an accepted and usual course of judicial proceedings in finding the intercepted telephone communications were properly authenticated and accurately reproduced the auditory experience of the setting. Simply, the district court abused its discretion in such finding and the Fifth Circuit should have reversed, vacating the lower court's ruling. The mere identification, if correct, of the petitioner's voice on the tape, does not represent the recordings were accurately reproduced, or reliable in content, in accordance with *Biggins*, or even those of *Stone*. Especially when the expert witness called by the government could not testify to any aspect of the competency of the operators, or even as to what equipment was used for the intercepts. His testimony could not be found to have in any aspect assisted in the authentication of the auditory experience, as he could not relate to any element of the *Biggins* rule, nor did he

possess any knowledge of how the tapes were made, where, equipment used, operators' competency, or fidelity of the equipment. (App. A at 7; R.V. 8, pp. 47-49.)

CONCLUSION

This Court should grant the Petition for Writ of Certiorari and reverse the decision of the Fifth Circuit Court of Appeals as such applies to the issues set forth herein. (App. A at 7-9.)

Dated: June 6, 2003

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-31359

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ALVIN C. GREEN, also known as Bones, also known as Shaka,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Louisiana

(Filed Mar. 11, 2003)

Before GARWOOD, JONES and STEWART, Circuit Judges.

CARL E. STEWART, Circuit Judge:

Alvin C. Green ("Green") appeals various procedural rulings by the district court. For the following reasons, we affirm in part and reverse in part.

FACTUAL AND PROCEDURAL BACKGROUND

From June through August 1999, pursuant to court authorization, law-enforcement agents intercepted telephone conversations occurring over two cellular phones used by Green. The intercepts graphically depicted Green's drug trafficking and money laundering activities. On January 27, 2000, two law enforcement officers, armed

with a parole warrant, arrested Green. One of the officers conducted a warrantless search of Green's automobile and recovered a .357 caliber revolver.[1] On April 5, 2000, Green was indicted on the following charges: Count I, conspiracy to possess with the intent to distribute and to distribute cocaine and 50 grams or more of cocaine base in violation of 21 U.S.C. § 846; Count II, distribution of 50 grams or more of cocaine base, in violation of 21 U.S.C. § 841(a)(1); Counts IV and V, engaging in a monetary transaction using criminally derived property, in violation of 18 U.S.C. § 1957; Counts VI through IX, unlawful use of a communications facility, in violation of 18 U.S.C. § 843(b); and Count X, possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). The Government filed two superceding indictments which amended Counts I, II, and X to include, among other things, Green's prior drug and felony convictions.

Both parties filed a number of pre-trial motions. Relevant to this appeal, the district court denied Green's motion to suppress the warrantless search of his vehicle. The district court granted the Government's motion to authenticate the intercepted wiretaps and to use the corresponding transcripts.[2] The case proceeded to a jury trial. During the trial, the district court denied Green's request to sequester Special Agent Mark Lusco ("Lusco"), and Task Force Agent Rudy Babin [sic], ("Rabin," collectively with Agent Lusco, "DEA agents") from being present

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[1] The details of the search are discussed *infra*.

[2] Of no significant relevance to this appeal, Green's motion to strike his prior felony and drug convictions from the two superseding indictments was granted.

in the courtroom. The district court further denied Green's request to prevent the DEA agents from serving as expert witnesses. Finally, the district court overruled Green's objection calling for a mistrial based on comments made by the prosecutor in his rebuttal.

On April 19, 2001, the jury found Green guilty on all counts. Green was sentenced to life imprisonment on Counts I, II, and X, ten years on Counts IV and V, and eight years on Counts VI through IX, with all terms to be served concurrently. Green appeals the district court's procedural rulings. Green also moves for a new trial claiming that the district court committed plain error by failing to sever Count X from the remaining counts of the indictment.

DISCUSSION

I. Warrantless Search

Green contends that the district court erred by failing to suppress the firearm recovered during the warrantless search of his vehicle. When reviewing a district court's ruling on a motion to suppress, we review questions of law *de novo* and factual findings for clear error. *See United States v. Vasquez,* 298 F.3d 354, 356 (5th Cir. 2002).

The facts of Green's arrest are as follows. Armed with a warrant based on a parole violation, two law enforcement officers, followed Green from a location to his residence. When the officers pulled into his driveway, Green was on his front door steps, around twenty-feet from his vehicle. After the officers parked their car, they announced who they were. After they identified Green, they summoned him back to the driveway and placed him on an adjacent automobile in a frisk-type position. Green was

initially cooperative. However, when the officers advised Green that he was under arrest for a parole violation, Green broke away and ran. Green was quickly tackled and immediately handcuffed, approximately six to ten feet from his vehicle. As Green was lying on the ground, handcuffed, surrounded by the arresting officer and three other Baton Rouge city police officers called to the scene, another officer searched Green's vehicle and recovered a .357 caliber revolver found protruding from beneath the driver's seat.

The district court found that the case was governed by *New York v. Belton,* 453 U.S. 454 (1981) and denied Green's motion to suppress the firearm. Green asserts that this case is governed by *Chimel v. California,* 395 U.S. 752 (1969), while the Government asserts that *Belton* is controlling. We find that neither case is controlling and hold that the district court erred in denying Green's motion to suppress the firearm.

The Supreme Court developed the doctrine of search incident to arrest in *Chimel.* The Supreme Court held that an officer making a lawful custodial arrest may search the person in custody and the "area 'within his immediate control'" into which he might reach in order to obtain a weapon or to destroy evidence. 395 U.S. at 763. The Supreme Court addressed the applicability of this doctrine to searches of automobiles in *Belton.* There, the Supreme Court held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." 453 U.S. at 460. The Supreme Court in *Belton* adopted this bright line rule to avoid case-by-case evaluations of whether the defendant's area of control within the automobile extended

to the precise place where the policeman found the weapon or evidence. *See* 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 7.1 at 136 (Supp.1982).

Although this Court has not addressed this issue, the decisions from other Circuits are instructive. The Sixth and D.C. Circuits do not apply *Belton* where the police come upon the arrestee outside of his vehicle. *See United States v. Strahan,* 984 F.2d 155, 159 (6th Cir. 1993) (declining to apply *Belton* where the officer first made contact with the defendant after he had exited his automobile and was thirty feet away from his vehicle when arrested); *United States v. Fafowora,* 865 F.2d 360, 362-63 (D.C.Cir. 1989) (declining to apply *Belton* to a search of a defendant's automobile where the defendant had parked and was walking in the opposite direction, approximately one car length away, at the time of the arrest).[3] The Seventh

[3] The Sixth Circuit also applies *Belton* where the police initiates [sic] contact prior to the defendant's exit of the automobile. *See United States v. Hudgins,* 52 F.3d 115, 119 (6th Cir. 1995) (applying *Belton* and concluding that the search was proper as a search incident to an arrest where the officer first initiated contact with the defendant while he was still inside his automobile); *see also United States v. White,* 871 F.2d 42, 44 (6th Cir. 1989). The Seventh and Tenth Circuits apply *Belton* in cases where the defendant exercises control over the automobile at the time of the arrest despite the fact that he was not in the automobile at that time. *See United States v. Sholola,* 124 F.3d 803, 817 (7th Cir. 1997) (applying *Belton* where the defendant's words and conduct linked him to the car and conveyed that the vehicle was his, or at least under his dominion and control despite the fact that the "defendant was not technically an occupant of the vehicle immediately prior to the search"); *United States v. Franco,* 981 F.2d 470, 472-73 (10th Cir. 1992) (applying *Belton* where the defendant was arrested in an undercover agent's car near his automobile based on the fact that he accessed his automobile

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Circuit, however, applies *Belton* where the defendant exited the automobile immediately prior to his arrest. *See United States v. Willis,* 37 F.3d 313, 317-18 (7th Cir. 1994).

Relying on the Seventh Circuit's reasoning, the Government asserts that *Belton* is applicable because the search of Green's vehicle occurred shortly after Green exited his vehicle. Given the undisputed facts of this case regarding Green's actions, we do not find the Seventh Circuit's reasoning dispositive. The principle behind *Belton* and *Chimel* is to protect police officers and citizens who may be standing nearby from the actions of an arrestee who might gain access to a weapon or destructible evidence. In this case, the officers approached Green after he exited his vehicle and was at his front door steps, around twenty-five feet away from his vehicle. Although Green attempted to flee from the officers, the Government admits that at the time the search occurred, Green was handcuffed and lying face down on the ground surrounded by four police officers, approximately six to ten feet away from his vehicle. The record contains testimony from the officer who searched Green's vehicle that, at the time of the search, Green was "pretty secure" and that he and the other officers did not fear that their life or safety was in danger. Because none of the concerns articulated in *Chimel* and *Belton* regarding law enforcement safety and the destruction of evidence are present in this case, the Government cannot justify the search of Green's vehicle under *Belton* or *Chimel.* Accordingly, we conclude that the

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during the transaction which established that he was in control of the automobile at the time of his arrest).

district court erred in denying Green's motion to suppress the weapon obtained from his vehicle.

II. Authenticity of Intercepted Wire Communications

To establish authenticity, the Government must demonstrate: 1) the operator's competency, 2) the fidelity of the recording equipment, 3) the absence of material alterations, and 4) the identification of relevant sounds or voices. *See United States v. Biggins,* 551 F.2d 64, 66 (5th Cir. 1977); *United States v. Stone,* 960 F.3d 426, 436 (5th Cir. 1992). The party seeking to establish authenticity need not meet all the factors set out in *Biggins,* if "... upon independent examination, the district court is convinced that the 'recording accurately reproduces the auditory experience.'" *United States v. Buchanan,* 70 F.3d 818, 827 (5th Cir. 1996) (quoting *Stone,* 960 F.2d at 436). This Court reviews the district court's determination of authenticity of the recordings for abuse of discretion. *Id.*

Green asserts that the district court erred in finding that his intercepted telephone recordings had been authenticated. Green maintains that the Government failed to demonstrate that the recordings were reliable. Specifically, Green asserts that Agent Lusco and Barry Stewart, the Government's expert witnesses, did not adequately demonstrate how the recording equipment worked, who worked it, what kind of training the operator had, whether the equipment was reliable, and when the recordings were made.

After reviewing the record, we are persuaded that the intercepted telephone recordings accurately reproduce the auditory experience. As one of the case agents overseeing the wiretap operation, expert witness Agent Lusco possessed

knowledge of the reliability of the intercepted telephone recordings. Having met Green, Agent Lusco was also able to identify his voice. Although we acknowledge that Agent Lusco was unaware of the specific workings of the equipment and the operator's competency, the record reflects that both he and Agent Rabin [sic] listened to each intercepted call and corroborated Green's conversations with his actions on numerous occasions. Thus, we find that the district court did not abuse its discretion when it determined that the intercepted recordings were authenticated and admitted the corresponding transcripts into evidence.

III. Sequestration of the DEA Agents

Green contends that the district court erred in exempting both DEA agents, from sequestration pursuant to Rule 615 of the Federal Rules of Evidence. This Court reviews a district court's compliance with Rule 615 for abuse of discretion, and we will reverse only if Green can demonstrate prejudice. *See United States v. Hickman,* 151 F.3d 446, 453 (5th Cir. 1998).

During the trial, the Government argued that Rule 615 does not "set forth a limit to the number of case agents that may sit [at its] table." The district court agreed and exempted the DEA agents from sequestration. As noted in *Hickman,* this Court has never decided whether the Government can designate more than one individual as its case agent, however we have permitted the exemption of more than one case agent from sequestration if their

presence is essential to the presentation of the case. *See Hickman*, 151 F.3d at 453; FED.R.EVID. 615(3).[4]

The Government asserts that the DEA agents' presence was essential to its case given the nature of the investigation. The Government explains that because they are required to run all wiretap operations out of New Orleans, the DEA agents, who were located in Baton Rouge, had to split up their review of the intercepted recordings. Thus, the Government asserts that the presence of both agents was necessary because they were slated to testify regarding different intercepted telephone conversations. Upon review of the record, we are not persuaded that this division of responsibility necessarily rendered both DEA agents presence in the courtroom throughout the trial essential to the Government's presentation of its case. The district court likewise does not offer any compelling rationale for why both DEA agents presence was essential to this case.

While we deem the presence of both DEA agents arguably unnecessary, nonetheless because Green has not identified any specific prejudice he suffered because of the DEA agents presence, we decline to find that the district court committed reversible error in exempting them from sequestration.

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[4] Rule 615 does not authorize the exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

IV. DEA Agents' Testimony as Experts

Green contends that the district court erred in allowing the DEA agents to testify as expert witnesses in the areas of drug trafficking and money laundering. Green argues that the DEA agents' testimony was biased and not impartial due to their involvement in the case. Because the basis for Green's objection during trial is different from the theory he now raises on appeal, "plain error" is the standard of review. *See United States v. Jimenez,* 256 F.3d 330, 340 (5th Cir. 2001) (holding that "where the theory underlying the basis for an appeal is different from the one raised in the lower court, 'plain error' should be the standard of review").[5]

Rule 702 of the Federal Rules of Evidence provides that a witness qualified as an expert by knowledge, skill, experience, training or education, may testify in the form of opinion or otherwise if technical or specialized knowledge will assist the jury. The Government asserts that Rule 702 does not prohibit a law enforcement officer, who has investigated the matter at issue, from testifying as an expert. We agree. Furthermore, we find that Green failed to demonstrate how the DEA agents' expert testimony "seriously affected the fairness, integrity, or public reputation of the judicial proceeding." *United States v. Longoria,* 298 F.3d 367, 371 (5th Cir. 2002). During the trial, Green's counsel could have cross-examined the DEA agents regarding their alleged bias. In fact, Green's counsel attacked the DEA agents' credibility as experts during his

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[5] The record reflects that Green objected to the DEA agents serving as expert witnesses based on their lack of education and training in the areas of narcotics trafficking and money laundering.

closing argument and the district court advised the jury that it could assess the credibility of the expert witnesses. We find that the district court did not plainly err in allowing the DEA agents to serve as expert witnesses.

V. Prosecutorial Comments

Green asserts that the district court erred in denying his request for a mistrial. Green maintains that his due process rights were violated by the prosecutor's improper comments during his rebuttal closing argument regarding Green's failure to testify. The Government counters that the prosecutor's statements were made in response to Green's counsel's closing argument that the Government failed to turn over a portion of the intercepted telephone recordings to Green. Green's argument is reviewed for plain error because his argument on appeal differs from the argument raised below. *See Jimenez,* 256 F.3d at 340.[6]

The Fifth Amendment prohibits a prosecutor from commenting either directly or indirectly on a defendant's failure to testify. *See United States v. Mackay,* 33 F.3d 489, 495 (5th Cir. 1994). When determining whether a prosecutor has made such a comment, we consider 1) whether the prosecutor's manifest intent was to comment on the defendant's silence or 2) whether the character of the remark was such that the jury would naturally and necessarily construe it as a comment on the defendant's

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[6] At trial, Green's counsel called for a mistrial arguing that the prosecutor's statement impermissibly shifted the burden of proof to Green. Green's counsel asserted that Green "had no burden to put forth any evidence whatsoever."

silence. *Id.* If there is an "equally plausible explanation for the remark," the prosecutor's intent is not manifest. *United States v. Grosz,* 76 F.3d 1318, 1326 (5th Cir. 1996). Green's counsel made the following statement during his closing argument:

> . . . only those actions which [sic] the spin can be placed, to throw a light of dishonesty, criminality, or illegality, was [sic] brought forth to you by the Government. You heard the agents testify of the thousands and thousands and thousands of telephone calls, and that the agents made the decision, using the words, which ones were pertinent and non-pertinent. The non-pertinent calls, those judged non-pertinent by the Government, were never recorded . . . Don't you wonder what those calls were about? Wouldn't you love to know what those calls said, as well? Not just the ones that they could give the spin, the twist, the sinister meaning to.
>
> We'll never know that because they not [sic] there. They tried to explain their way out of that the other day on the stand by saying, oh, no, we recorded the non-pertinent calls, too. No, they didn't. No, that's not right. They recorded an initial portion, and when they could tell that call wasn't going where they wanted it to go, for their spin and their twist, click goes the machine.

In his rebuttal, the prosecutor responded by making the following statement regarding the Government's duty to minimize calls:

> Now, Special Agent Lusko said there were about 2,000 calls. We would still be here playing all of those calls. You heard Special Agent Lusko say

> that he provided every one of those calls to Mr. Bourland. Every one of them . . .
>
> . . . by the way, conversation number 50, it will say minimize. What does that mean? Well, it means that, yes, that conversation was intercepted, we recorded it, but those were among hundreds of conversations provided to the defendant, *which he didn't play.*

Green argues that his counsel's statements referenced unrecorded telephone calls, not those recorded by the Government, whether deemed pertinent or non-pertinent. Green asserts that it would have been impossible, even if desired, for him to put forth telephone conversations that were not recorded and do not exist. After reviewing the prosecutor's comments in the context in which they were stated, we conclude that the comments did not reference Green's silence. *See United States v. Virgen-Moreno,* 265 F.3d 276, 293 (5th Cir. 2001) (holding that the prosecutor did not reference the defendant's failure to testify where the statement was made in response to a comment made by the defense). The prosecutor's comments were merely in response to the defense's argument that the Government failed to turn over intercepted conversations to Green. We find that no reasonable jury would infer that the prosecutor was treading upon Green's right to remain silent. Thus, the district court did not err in denying Green's request for a mistrial.

VI. Misjoinder of Count X

Acknowledging that his counsel failed to move to sever Count X, possession of a firearm by a convicted felon, from the remaining counts in the indictment, Green argues that this misjoinder constituted plain error. Green

argues that Count X arose at a completely different time from the period covered by the other counts at trial. As a result, Green avers that the joinder of Count X "cloud[ed] the fairness of the trier of fact as to the character and propensities." We disagree. The record contains abundant evidence of Green's guilt of the drug trafficking and money laundering related counts. Furthermore, if there was plain error, it did not seriously affect Green's substantial rights or the "fairness, integrity, or public reputation of the judicial proceeding." *Longoria,* 298 F.3d at 371.

CONCLUSION

For the foregoing reasons, we REVERSE the denial of Green's suppression motion, VACATE the conviction as to Count X, and REMAND for further proceedings consistent with this opinion. The remaining convictions are AFFIRMED.